STATE OF MICHIGAN

COURT OF APPEALS

NAGA L. PHILLIPS,

Plaintiff-Appellant,

v

THE HOME DEPOT USA, INC.,

Defendant-Appellee.

UNPUBLISHED
September 11, 2008

No. 279341
Eaton Circuit Court
LC No. 06-001092-NZ

Before: Donofrio, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). Plaintiff filed suit seeking damages for personal injuries allegedly arising out of an incident in which a roll of linoleum fell on plaintiff's foot as she shopped at defendant's store. We affirm.

I. Basic Facts and Procedural History

On March 12, 2005, plaintiff went shopping for linoleum at defendant's store. She found several rolls of linoleum remnants located in a bin and selected one. After inspecting the remnant, she noticed that it had some undesirable markings and she sought a store employee to assist her in locating another roll. Unable to find any help, plaintiff returned to the bin and removed a similar remnant on her own. Plaintiff claims that while removing the second remnant another roll of linoleum fell and struck her left foot, fracturing it. At her deposition, plaintiff was unable to recall how she removed the second roll from the bin or how the other roll fell on her foot. She could only state that the roll that fell on her foot came from somewhere in or around the area of the bin. Plaintiff did not notice any linoleum rolls out of place in the bin area when the accident occurred. She saw nothing unusual or potentially dangerous regarding the way the linoleum was stored.

Plaintiff testified that the remnants were not heavy, and there is no indication in the record that she had any difficulty or needed assistance in handling the remnants. Indeed, after the alleged accident, plaintiff carried her desired roll, unassisted, to the checkout aisle where she reported the incident to a cashier who called the store manager. The store manager prepared an incident report. The incident witness statement signed by plaintiff provides in full, "[I] was pulling out a roll of linoleum and while I was doing this another roll came out and hit (landed) on the top of my left foot." Plaintiff did not ask for medical attention at the store, instead she

purchased the linoleum and drove home alone. She later obtained medical treatment for her foot. Plaintiff testified that she had no opinion regarding what defendant should have done to help prevent the injury.

Plaintiff enlisted the assistance of premises liability expert William Julio. In a report, Julio communicated four concerns and criticisms regarding defendant's operations and the incident, asserting (1) an insufficient number of inspections carried out by defendant's employees,[1] (2) a lack of warning signs,[2] (3) a failure to take photographs of the accident scene immediately following the incident, and (4) a lack of recorded inspections. Julio opined that there were only two ways that the incident could have occurred, either the roll, standing vertically, slipped and fell off a horizontal restraint bar near the bottom of the display or the roll was standing on the floor, outside the bin and leaning against the display, and then fell over and hit plaintiff's foot.[3] Julio's focus was on defendant's failure to conduct regular inspections to search for displaced items and hazards. During his deposition, Julio acknowledged that the allegedly displaced linoleum that fell on plaintiff's foot may have been in that position for "[f]ive hours, five minutes, [or] five seconds." He stated that no one could tell how long the linoleum roll had been out of position and that he could only speculate on the matter. Julio also conceded that plaintiff herself may have taken the first linoleum roll that she handled and placed it on the lower horizontal restraint bar or the ground and then, when she later removed the second remnant, knocked over the first roll onto her foot. Plaintiff's own version of events does not preclude that possibility. In addressing questions regarding the various ways that the accident could have occurred, Julio noted that "anything is possible." And when addressing a question concerning the technique or manner by which one might remove a linoleum roll from the bin, Julio stated that his responses were "all conjecture." He acknowledged that he had no idea how

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[1] Julio opined that in retail stores it is vital that employees regularly patrol and inspect the aisles and shelves to make sure that products are in their proper positions so as to avoid accidents involving items that may present a hazard when out of place or incorrectly shelved, given that customers regularly handle products and may not properly return them to the shelving area. Julio stated that hourly inspections should be undertaken to monitor store conditions. Julio indicated that the evidence reflected that defendant only conducted inspections twice daily, violating industry wide practices.

[2] Julio indicated that warning signs are necessary to alert customers to hazards and to direct them to seek the assistance of store employees relative to handling heavier items or obtaining items in difficult to reach locations.

[3] Plaintiff's case is not based on deficiencies in the bin or the manner in which the linoleum remnants are generally stored. Julio testified that the linoleum is safely stored within the bin. He stated:

> So the basis of my case was that it is not the shelving or the racking that is the problem. The problem is the replacement of product back on the shelf or putting new product on the shelf and a lack of inspections, because of customers altering the product.

plaintiff pulled the roll of linoleum out of the bin. Julio further acknowledged plaintiff's nearly complete lack of insight and knowledge as to what exactly occurred.

Plaintiff filed a premises liability complaint against defendant, alleging that defendant's negligence caused her injuries. Defendant subsequently filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). The trial court denied the motion for purposes of MCR 2.116(C)(8), but granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). Ruling from the bench, the trial court first noted that plaintiff could not state how the linoleum roll fell or from where it came, that plaintiff was able to lift and carry the selected roll, and that plaintiff was the only witness to the incident. The court also found that Julio's testimony constituted mere speculation and that no one could establish that there was indeed a displaced roll of linoleum that caused plaintiff's injuries. On the issue of warning signs, the trial court, making an analogy, questioned whether a grocery store needed to provide signs for products such as a 24-pack of cola. The court believed that if you took plaintiff's position to its logical extreme, "almost every retail establishment worldwide [would] need signs all over the place." The trial court addressed the duty of invitors to invitees and found that, aside from speculation and conjecture, there was no evidence that defendant had any notice of a hazard or that a hazard or unreasonable risk of harm even existed. According to the court, plaintiff could not demonstrate that any failure to inspect actually caused her harm. Finally, the trial court observed that the alleged hazard, if it existed, would have been open and obvious. Plaintiff's motion for reconsideration was denied, and she now appeals by right to this Court.

II. Analysis

A. Standard of Review and Summary Disposition Tests under MCR 2.116(C)(10)

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kriener v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).[4]

[4] Plaintiff incorrectly contends that we must determine whether a record "might be developed" at trial that will leave open a disputable factual issue upon which reasonable minds could differ. (continued…)

B. General Principles Governing Premises Liability

There is no dispute by the parties that plaintiff was an "invitee." In *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000), the Supreme Court explained the characteristics of an invitee and the obligations that arise on the part of a landowner when a person entering the landowner's property has the status of an invitee:

> An "invitee" is "a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. Thus, an invitee is entitled to the highest level of protection under premises liability law. . . . [I]nvitee status is commonly afforded to persons entering upon the property of another for business purposes. [Citations omitted; alterations in original.]

In general, a premises owner owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). A possessor of land is subject to liability for any physical harm caused to an invitee by a condition on the land, but only if the possessor knows of, or by the exercise of reasonable care would discover, the condition, realizes that it presents an unreasonable risk of harm to the invitee, expects that the invitee will not discover the condition or realize the danger, and fails to exercise reasonable care to protect the invitee against the danger. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

The duty owed to an invitee does not generally encompass removal of open and obvious dangers. *Lugo, supra* at 516. Where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, the invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee. *Id.*, quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Whether a particular danger is open and obvious is dependent on whether it is reasonable to expect an average user of ordinary intelligence to discover the danger on casual inspection. *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995). In determining whether an alleged dangerous condition is open and obvious, such a determination focuses on the characteristics of a reasonably prudent person. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004). Because the test is objective, courts do not look at whether a particular plaintiff should have known that the condition was hazardous, but to whether a reasonable person in his or her position would foresee

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Our Supreme Court in *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999), overruled the "might be developed" concept and held that present evidentiary proofs must be submitted relative to a motion for summary disposition.

the danger. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002). "In sum, the general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo, supra* at 517.

C. Discussion

On appeal, plaintiff argues that the trial court impermissibly weighed the evidence and invaded the province of the jury by deciding factual questions, failed to view the evidence in a light most favorable to plaintiff, erred in concluding that the alleged hazard was open and obvious and not subject to any special aspects exception, thereby disregarding Julio's expert testimony and report, and erred in finding that there was no duty to warn.

Consistent with the legal authority cited above, plaintiff was required to present documentary evidence sufficient to create a genuine factual dispute regarding the existence of an unreasonable risk of harm (hazard), defendant's actual or constructive knowledge of the hazard, whether defendant exercised reasonable care, which can entail duties to warn and inspect, causation, and whether the hazard was open and obvious or subject to a special aspects exception. Plaintiff has failed to satisfy her evidentiary burden.

Before examining the documentary evidence supporting our conclusion, we note our Supreme Court's ruling in *Skinner v Square D Co*, 445 Mich 153; 516 NW2d 475 (1994), which addressed the issue of speculation in the context of summary disposition. In *Skinner*, the plaintiffs' decedent was electrocuted by a homemade tumbling machine on which he had installed an on/off switch manufactured by the defendant. The plaintiffs alleged that the switch was defectively designed and caused the decedent's death because the switch would sometimes appear to be turned off when it was actually on. There were no direct witnesses to the incident, other than the decedent. The Supreme Court concluded that the plaintiffs "failed to offer evidence from which reasonable minds could infer that the alleged defect caused the decedent's death." *Id.* at 156-157. The Court reinforced the notion that a plaintiff may utilize circumstantial evidence to show the requisite causal link between a defect and an injury, but "the mere happening of an unwitnessed mishap neither eliminates nor reduces a plaintiff's duty to effectively demonstrate causation." *Id.* at 163. The circumstantial evidence must facilitate a reasonable inference of causation, not mere speculation, and the causation theory must have some basis in established fact. *Id.* at 164. Quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956), the *Skinner* Court stated:

> "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence." [*Skinner, supra* at 164.]

The circumstantial evidence must afford a reliable basis from which reasonable minds could infer that, more probably than not, but for the defect no injury would have occurred. *Id.* at 171.

Here, plaintiff's case is pure conjecture and speculation. Plaintiff admitted in her deposition that she did not have any recollection of how she pulled the selected roll of linoleum out of the bin, nor could she recall how the other roll fell on her foot or from where it even came. Her own expert, Mr. Julio, stated in his deposition that "anything is possible" and later admitted to engaging in conjecture. Factually speaking, we only have evidence that a roll of linoleum fell on plaintiff's foot while she removed another roll, that she could not find an employee to assist her before the accident in relation to finding a remnant, and that defendant inspected the store twice daily. On the basis of this evidence, when viewed in a light most favorable to plaintiff, and contemplating Julio's testimony and report, it is not reasonable to infer that there existed an unreasonable risk of harm or a hazard of which defendant was aware or should have known about and that defendant failed to exercise reasonable care for the safety of its patrons by way of inspections and warning signs.

Further, while there was evidence that a falling remnant caused plaintiff's injuries, there was insufficient circumstantial evidence establishing a reliable basis from which reasonable minds could infer that, more probably than not, but for any assumed negligence on the part of defendant no injury would have occurred. It is just as likely that plaintiff herself displaced the roll of linoleum that soon thereafter fell on her foot when she was selecting another roll. Julio acknowledged that the rolls of linoleum were generally stored in a safe position and that the display itself was not the cause of the accident. According to Julio, it was the lack of regular inspections and the failure to properly place products back in their original location that caused the accident, but, assuming that the roll of linoleum was displaced as claimed, he could not state how long the roll had been sitting on the bottom restraint bar of the bin or the ground ("No one knows . . . [f]ive hours, five minutes, five seconds"). And he conceded that the roll that fell on plaintiff's foot may have been placed on the bottom restraint bar or ground by plaintiff herself.[5] The trial court did not impermissibly weigh the evidence, did not invade the province of the jury, and did not fail to view the evidence presented in a light most favorable to plaintiff. Instead, the court correctly ruled that plaintiff's arguments were based merely on speculation and conjecture.[6]

Regarding a duty to warn plaintiff of the dangers of displaced products or removing products without assistance, the evidence reflected that plaintiff needed no assistance in

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[5] We note that plaintiff did not testify or claim that she properly returned to the bin the first roll of linoleum that she handled.

[6] While we decline to evaluate whether Julio's testimony regarding the theories of how the accident occurred would be admissible at trial, it is questionable whether his opinion would be based on sufficient facts or data given plaintiff's vague account or whether he had *specialized* knowledge that would assist the jury to understand the evidence or to determine a factual issue. MRE 702. It would appear that the question of how a remnant might conceivably have fallen on plaintiff's foot would be within the realm of knowledge of a layperson, without the need for expert opinion.

removing the linoleum from the bin. And assuming a duty to warn of displaced products, which is highly questionable for the reasons proffered by the trial court, there is only speculation and conjecture that a failure to warn caused plaintiff's injuries.

Even were we to assume that an unreasonable risk of harm existed, that defendant knew or should have known of the risk, that the risk was not of plaintiff's own making, and that defendant failed to exercise reasonable care, the hazard was open and obvious. As indicated above, a hazard is open and obvious if a reasonably prudent person would be able to perceive the danger associated with it upon casual inspection. *Eason, supra* at 264. Here, plaintiff had two opportunities to observe any potential dangers associated with the remnants and the display. Plaintiff was necessarily looking directly at the linoleum display when she found the first roll with the markings on it and when she lifted out her desired roll, unassisted, from the bin. Viewing the evidence in a light most favorable to plaintiff, we hold, as a matter of law, that a reasonably prudent person in plaintiff's position would have observed, on casual inspection or observation, a remnant standing outside the bin and leaning against it or a remnant standing on the bottom horizontal restraint bar.

Plaintiff suggests that special aspects existed that required defendant to warn invitees of the potential harm despite the open and obvious nature of the hazard, but this argument clearly fails. Viewing the evidence in a light most favorable to plaintiff, we hold, as a matter of law, that the claimed hazard was avoidable, that it did not present a substantial risk of death or severe injury, and that the risk did not give rise to a uniquely high likelihood of harm if not avoided. See *Lugo, supra* at 518-519.

III. Conclusion

The trial court did not err in granting defendant's motion for summary disposition. Plaintiff's case is clearly speculative and not grounded in sufficient circumstantial evidence from which a cause of action can reasonably be inferred. Moreover, assuming the presence of a hazard, actual or constructive knowledge of the hazard by defendant, and failure to exercise reasonable care causing injury, there was no duty owed to plaintiff because the danger was open and obvious and not subject to a special aspects exception to the open and obvious danger doctrine.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald